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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 723

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

JACOB A. GOLDMAN ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (unreported) appears at R. 46.

JURISDICTION

The judgment to be reviewed is that of the District Court for the Southern District of Ohio filed December 2, 1927. (R. 54.) The writ of error was sued out December 28, 1927. (R. 56.)

By this judgment the District Court sustained a special plea in bar to an information charging the defendants with criminal contempt in violation of a decree. The plea was sustained solely on the ground

that more than one year had elapsed between the commission of the offenses charged and the filing of the information. It is the Government's contention that the period of limitation here to be applied is three years (under the decision of *Gompers* v. *United States*, 233 U. S. 604) and not one year (under the Clayton Act of October 15, 1914, c. 323, 38 Stat. 730 (U. S. C. Title 28, Sec. 390).

This writ of error is prosecuted under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246; U. S. C. Title 18, Sec. 682. (R. 65.) The jurisdiction of this Court is challenged by the defendants and dealt with on pages 12–26 of this brief.

QUESTIONS PRESENTED

The first question is whether the Criminal Appeals Act, in authorizing the United States to sue out writs of error in all criminal cases to review judgments sustaining special pleas in bar, allows such a review of a decision dismissing an information charging criminal contempt on the ground that the statute of limitations has run.

The other question is whether the statute of limitations applicable to this case fixes one or three years as the period of limitation.

STATUTES INVOLVED

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C. Title 18, Sec. 682), provides:

> A writ of error may be taken by and on behalf of the United States from the district

* * * courts direct to the Supreme Court of the United States *in all criminal cases*, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant. (Italics ours.)

Sections 21 to 25 of the Clayton Law, c. 323, 38 Stat. 730, 738–740 (U. S. C., Title 28, Secs. 386–390), provides:

SEC. 21. That any person who shall wilfully disobey any lawful writ, process, order,

rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer,

and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000,

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nor shall such imprisonment exceed the term of six months: *Provided*, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

SEC. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor

to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

Section 1044 of the Revised Statutes, as amended by the Act of November 17, 1921, c. 124, Sec. 1, 42 Stat. 220 (U. S. C. Title 18, Sec. 582), provides:

No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however*, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This act shall apply to acts, offenses, or transactions where the exist

> ing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

Section 1046 of the Revised Statutes (U. S. C. Title 18, Sec. 584) provides:

> No person shall be prosecuted, tried, or punished for any crime arising under the revenue laws, or the slave trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime.

STATEMENT

On November 2, 1925 (R. 37), in the District Court of the United States for the Southern District of Ohio, the United States Attorney filed an information in criminal contempt, charging the defendants, parties to this appeal, and others—sales agents and salesmen of the National Cash Register Company—with having in 1923 or 1924 (more than one year but less than three years prior to filing the information) violated the provisions of a final decree entered in that District in 1916 in the case of *United States* v. *National Cash Register Company et al.* That decree (set forth in full at R. 5), held that the National Cash Register Company had violated the Sherman Antitrust Act and enjoined the company and its officers and agents from doing any of certain specified acts set forth in the decree. On the date of the filing of the information the court granted a rule to show cause and on February 15, 1926, the defendants

severally appeared and entered pleas of not guilty. (R. 38–39.)

In order to take the testimony of witnesses who resided in different parts of the country, the court, by order dated March 1, 1926, appointed a special examiner. (R. 39.) Under this order the examiner was directed to take testimony in anticipation of trial and in preparation thereof. (R. 62–63.) At the time of the entry of the order it was understood (this understanding was confirmed by a nunc pro tunc order by the court dated January 19, 1928 (R. 62)), that both the defendants and the Government were to have the right "to introduce additional testimony and to rely for prosecution or defense upon such portions of the testimony theretofore taken, transcribed, and lodged with said judge as might be desired." After the examiner had herself taken the testimony stenographically and transcribed it, she lodged it with the Judge in his official capacity, but she did not file it with the Clerk of the District Court. (R. 63.) Before there was any trial in open court, but after testimony had been taken before such examiner, the eighteen defendants who are concerned in this appeal filed a motion which they called "a motion to dismiss." This motion was based upon the ground only "that it appears on the face of the information that this proceeding for contempt was instituted more than one year after the date of the alleged act or acts complained of in said charges." (R. 45.)

The Government demurred to this so-called motion, treating it in the demurrer as a special plea in bar. (R. 46.) On December 2, 1927, the District Court entered judgment overruling the Government's demurrer and sustaining the motion, which the court, in its opinion (R. 46–54) designated as a special plea in bar. In that opinion the court held that as to these defendants the prosecution was barred by reason of the one year statute of limitations. Jurisdiction is here invoked under the third section of the Criminal Appeals Act.

SPECIFICATION OF ERROR TO BE URGED

The District Court erred in sustaining the motion to dismiss, and in holding that the period of limitation was one year.

SUMMARY OF ARGUMENT

I. This Court has jurisdiction of this case under the Criminal Appeals Act of 1907 because (a) the Criminal Appeals Act applies to all criminal cases and criminal contempts are crimes, both at common law and under modern statutes; (b) the Third Section of the Act relating to pleas in bar is applicable to criminal cases begun by information (as was this case) as well as those begun by indictment, for that section is expressly made applicable to "all criminal cases;" (c) the motion to dismiss, filed on behalf of the defendants below, was a special plea in bar within the meaning of the Act. The motion set up the statute of limitations contained in Section 25 of the

Clayton Act and such matter is properly put in issue under a special plea in bar. The fact that it was termed a motion to dismiss is unimportant for under this section of the Criminal Appeals Act the question whether the motion was in fact a special plea in bar should be determined not by form but by substance; (d) the defendants were never in jeopardy, for they were never on trial on any issue of fact before the court.

II. The case of *Gompers* v. *United States* settled that criminal contempts are governed by the three-year period of limitations. This period is still applicable to criminal contempts prosecuted by the Government for the law as to them has not been changed. The one-year period of limitation imposed by Section 25 of the Clayton Act by its very terms does not apply to this case, for Section 24 of that Act declares that "nothing herein contained" shall apply to such cases prosecuted by the United States. This view of the meaning of the contempt provisions of the Clayton Act is supported by the language of the Committee reports in Congress, by the debates in Congress, and by the history of the provisions in question. Moreover, this meaning of the statute is expressly adopted in the United States Code where it is declared that the one-year statute of limitations does not apply to cases prosecuted by the United States.

ARGUMENT

I

THIS COURT HAS JURISDICTION OF THIS CASE UNDER THE CRIMINAL APPEALS ACT OF 1907

Prior to the enactment of the Criminal Appeals Act certain writs of error from the Supreme Court to the Circuit Courts were governed by the provisions of the Act of March 3, 1891. By this statute appeals or writs of error were authorized "in any case that involves the construction or application of the Constitution of the United States." This statute was construed in the case of *United States* v. *Sanges*, 144 U. S. 310. There the Government sued out a writ of error to review a judgment of the District Court sustaining a demurrer to an indictment on the ground that the statute on which the indictment was based was unconstitutional. This court held (p. 312) that the provision above quoted did not confer on the United States the right to sue out a writ of error in a criminal case for "it is settled by an overwhelming weight of American authority, that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with *express statute*, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law." (Italics ours.)

It was as a result of that decision that various Attorneys General urged upon Congress the enactment of a statute that would confer upon the United States the right to sue out writs of error in all criminal

cases to determine questions of law arising before legal jeopardy attaches. (Annual Reports of the Attorneys General for the years 1899, 1900, 1903, 1905, 1906.) It appears from the reports of the Committees (59th Cong., 2nd Sess., House Report 8113; Senate Report 5650) that these recommendations of the Attorneys General were largely responsible for the passage of the Act.

From the reports, as well as from the debates, it is evident that Congress was legislating to meet the very situation presented by this case. Every practical reason which led to the inclusion in the Criminal Appeals Act of that section relating to special pleas in bar requires that this provision be applied to the present case. The purpose of the Act was to ensure uniformity in the interpretation of the criminal law throughout the country, by giving to the Government an opportunity to review unfavorable decisions on points of law, and, in particular, to ensure that the statutes of limitations should be uniformly understood and applied. That Congress was well advised in this respect may be seen from the fact that of a total of eight cases so far brought up to this Court on pleas in bar under the third section of the Criminal Appeals Act, no less than six [1] have involved an

[1] *United States* v. *Kissel*, 218 U. S. 601; *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Rabinowich*, 238 U. S. 78; *United States* v. *Oppenheimer*, 242 U. S. 85; *United States* v. *Noveck*, 271 U. S. 201; *United States* v. *Storrs*, 272 U. S. 652. The two which did not involve the statute of limitations were *United States* v. *Celestine*, 215 U. S. 278, and *United States* v. *Thompson*, 251 U. S. 407.

alleged erroneous application by the trial court of the statute of limitations. In three of these six cases the judgment below was reversed.

Unless Congress, by the Criminal Appeals Act, has accomplished such a purpose, this case illustrates that in this type of case we are back to the same lack of uniformity and to the same confusion as existed before the statute was enacted. Such a situation, we submit, is precisely that which the Criminal Appeals Act was intended to prevent; and we further submit that the language of that Act is plainly sufficient, in this case, to carry out the intention of its framers, for unlike the statute considered in the *Sanges Case* the Criminal Appeals Act provides for review, not "in any case," but "in all criminal cases."

(*a*) CONTEMPTS ARE CRIMINAL CASES WITHIN THE MEANING OF THE ACT

Under the decisions of this Court, *Gompers* v. *United States*, 233 U. S. 604; *Ex parte Grossman*, 267 U. S. 87; and *Michaelson* v. *United States*, 266 U. S. 42, criminal contempts are criminal cases within the meaning of this Act.

In the trial of criminal contempts, such as is here involved, the defendants are not entitled to a jury trial. In *Myers* v. *United States*, 264 U. S. 95, it was held that criminal contempts are not within the constitutional requirements of jury trial and venue, and in reliance upon that case defendants may urge that

criminal contempts such as these are not criminal cases. One answer to this is found in the historical treatise by Sir John Fox; "The History of Contempt of Court." He points out that until the 18th century criminal contempts not committed in the presence of the court were classed as crimes in England and were always punished in the common law courts by way of information, indictment and trial by jury. His thesis is that the present-day practice of proceeding by the summary process of attachment for contempt committed by a stranger out of court, and trying the defendant without the intervention of a jury, took its roots in an unsupported statement of Mr. Justice Wilmot in his undelivered judgment in *The King* v. *Almon*, Wilmot's Notes, 243, 254.

Certainly the nature and character of contempts has not been changed because the procedure of dealing with them has been changed. In fact, criminal contempts such as are here involved are still crimes in England and are triable by indictment, information, and trial by jury. Halsbury's Laws of England, Vol. 7, Section 604; 38 Law Quarterly Review, p. 197, Oswald on Contempt of Court, p. 6.

A further reply to the argument that contempts are not crimes because not triable by jury is found in the *Grossman Case, supra.* There the petitioner using the *Myers case* as an authority, argued that criminal contempts were not "offenses against the United States" within the meaning of the constitutional provision relating to pardons. The Court

there said, quoting from the *Gompers case, supra* (267 U. S. 116):

> It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc., to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson* v. *Baldwin*, 165 U. S. 275, 281, 282. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. *If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.* (Italics ours.)

(*b*) THE THIRD SECTION OF THE CRIMINAL APPEALS ACT, RELATING TO PLEAS IN BAR, IS APPLICABLE TO CRIMINAL CASES BEGUN BY INFORMATION AS WELL AS TO THOSE BEGUN BY INDICTMENT

It being established that a criminal contempt is a criminal case within the meaning of the Criminal Appeals Act, the question arises whether the section relating to pleas in bar is broad enough to include this case, which was begun by information. Jurisdiction is invoked under the section of the Act which provides for appeals in all criminal cases—

> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy

It is possible to urge that since the word "information" is not mentioned in the Criminal Appeals Act, it was not the intention of Congress to apply the provisions of that Act to "informations." Force is lent to this argument by the fact that in the two preceding sections there is specific reference to "indictments" and to decisions or judgments affecting "the invalidity or construction of the statute upon which the indictment is founded."

It is suggested that the word "indictment" used in the preceding sections should not be construed in its strict common law meaning, but in the broader meaning of any formal accusation (including information) by which criminal proceedings are begun. There is no lack of authorities to the effect that the words "indictment" and "indicted" in statutes and elsewhere may be construed as covering criminal

information. *United States* v. *Borger*, 7 Fed. 193; *Bailey* v. *Kalamazoo Publishing Co.*, 40 Mich. 251; Cf. *The Queen* v. *Steel*, L. R. 2 Q. B. D. 37, 1876–7.

Substance is added to the contention that both the Attorneys General and the Congress intended that the statute should apply as well to informations as to indictments by the case referred to as a reason for the enactment of the statute by Attorney General Griggs in his report to the Congress for the year 1900. Showing the importance of the subject, he cited the case of an information filed against a person charged with pasturing sheep on the Sierra Forest Reserve, in violation of the Act of June 4, 1897 (30 Stat. 35). The defendant filed a demurrer which was decided against the Government and in his report to the Congress (p. 40) the Attorney General pointed out that the Government had no right of appeal.

Whatever merit there may be in the above suggestion we base the right of the Government in the present case upon Section 3, which contains no words of limitation. If Congress did purpose by the insertion of the word "indictment" in the first two sections to limit the Government, then equally it could have done so in the third section. There is no such limitation because the language used in the two preceding sections, which may be construed as a limitation, is not included here. There being no such limitation and the opening paragraph of the Act being applicable to every section and including "all criminal cases," it seems clear that the Government has a right of review.

Support for this view is found in the decisions of this Court holding that the very section under discussion need not, like the two preceding sections, involve a decision or judgment which "is based upon the invalidity or construction of the statute upon which the indictment is founded." *United States* v. *Celestine*, 215 U. S. 278. In *United States* v. *Oppenheimer*, 242 U. S. 85, this Court assumed jurisdiction, though the judgment was not based on the invalidity or construction of the statute upon which the indictment was founded. In construing the section it pointed out that the limitations expressed in each of the two preceding paragraphs of the statute were not repeated in this paragraph, and that the language in *United States* v. *Keitel*, 211 U. S. 370, which was relied on by the defendants, referred only to the construction of the indictment in cases brought up by the Government under the earlier clauses of the Act.

Since, therefore, the section relating to pleas in bar is not limited to judgments based upon the invalidity or construction of the statute upon which an indictment is founded, we submit that it is likewise not limited as the two earlier sections may be, to indictments, but extends to criminal cases begun by information.

This Court has outlined the rule of statutory construction which is applicable to the Criminal Appeals Act. In *Gompers* v. *United States*, 233 U. S. 604, it was held that a statute limiting prosecution for crime "unless the indictment is found, or the information

is instituted within three years," applies to a criminal contempt not prosecuted by indictment. The reasoning of the Court in that case with respect to the statute of limitations applies to the Criminal Appeals Act in this case. At page 611 of the opinion it was stated:

> We come then to the construction of the statute. It has been assumed that the concluding words "unless the indictment is found or the information is instituted within three years" limit the offences given the benefit of the act to those usually prosecuted in that way, and the counsel for the petitioners were at some pains to argue that the charges of the committee amounted to an information; a matter that opens vistas of antiquarian speculation. But this question is not one to be answered by refinements and curious inquiries. In our opinion the proper interpretation of the statute begins with the substantive not with the adjective part. The substantive portion of the section is that no person shall be tried for any offence not capital except within a certain time. Those words are of universal scope. What follows is a natural way of expressing that the proceedings must be begun within 3 years; *indictment and information being the usual modes by which they are begun and very likely no other having occurred to those who drew the law.* But it seems to us plain that the dominant words of the act are "no person shall be prosecuted, tried, or punished for any offence not capital" unless. (Italics ours.)

It is, therefore, submitted that the section relating to pleas in bar is specifically applicable, in the very words of the Act, to "all criminal cases"—to those begun by information as well as to those begun by indictment.

(*c*) THE "MOTION TO DISMISS" FILED ON BEHALF OF DEFENDANTS BELOW WAS A SPECIAL PLEA IN BAR WITHIN THE MEANING OF THE CRIMINAL APPEALS ACT

Counsel below filed what they termed a "motion to dismiss" the charges against these defendants, on the sole ground "that it appears on the face of the information that this proceeding for contempt was instituted more than one year after the date of the alleged act or acts complained of." (R. 45.)

The Government filed a demurrer to this motion, in which demurrer the motion was treated as a special plea in bar. (R. 46.) The court entered judgment sustaining the motion. In the court's opinion (R. 46, 54), the motion was termed a special plea in bar. The Government now submits (and we understand that defendants' counsel will oppose us on this point) that its action, as well as that of the trial Judge, was correct with respect to the true nature of the plea, and that the so-called "motion" filed by the defendants was in fact what the trial judge called it—a special plea in bar within the meaning of the Criminal Appeals Act.

Under the Criminal Appeals Act the question whether the motion filed below was a special plea in bar is a question to be determined not by form,

but by substance. *United States* v. *Thompson*, 251 U. S. 407. What counsel call the plea is immaterial. It has been held that a so-called "motion to quash" an indictment upon the ground that it formerly had been adjudicated that a previous indictment was barred by the Statute of Limitations was a plea in bar within the meaning of this Act. *United States* v. *Oppenheimer*, 242 U. S. 85. Cf. *United States* v. *Rabinowich*, 238 U. S. 78. It has further been held that a so-called "plea in abatement" setting up the statute of limitations was a plea in bar within the meaning of the Criminal Appeals Act. *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Rabinowich*, 238 U. S. 78.

In some older cases, it is true, language may be found to indicate that the common function of a special plea in bar was to set up new matters *dehors* the record. This does not mean, however, that every special plea in bar, to fulfill its definition, *must* thus set up new matter. The language in the older cases should, we submit, be considered in the light of the earlier law. At common law, only four kinds of special pleas in bar (namely, autrefois convict, autrefois acquit, autrefois attaint, and pardon) were recognized in criminal cases; and each of these four did, in fact, serve to set up new matter. At common law there were no statutes of limitations in criminal cases; and pleas in bar based upon such statutes were accordingly unknown. In modern practice, on the contrary, as is shown by many cases in this Court, the defense of the statute of limitations may regularly

and properly be raised by a special plea in bar; and such a plea need not (and frequently does not) set up new matter.[2] The failure to set up new matter has never been held to make the plea defective or to change its essential nature.

While, therefore, the "motion to dismiss" filed by defendants below might not have been properly worded as a special plea in bar and might have been technically deficient in form, yet the "motion" in substance and effect was a special plea in bar within the meaning of the Criminal Appeals Act and the cases above cited. If the motion to dismiss is not a special plea in bar, what is it? It can not be regarded as a demurrer, for this Court has held that the defense of the statute of limitations in a criminal case must be raised either by special plea or under the general issue, and *can not* be raised by demurrer. *United States* v. *Cook*, 17 Wall. 168. Nor can it be regarded as a motion made at the trial under the general issue,[3] for the trial had not yet begun, and was not scheduled

[2] The records of this Court disclose that in each of the following cases where special pleas in bar were interposed, based upon the statute of limitations, the plea did *not* set up new matter. *Gompers* v. *United States*, 233 U. S. 604 (Oct. Term 1913, Nos. 574 and 640); *United States* v. *Rabinowich*, 238 U. S. 78 (Oct. Term 1914, No. 748); *United States* v. *Noveck*, 271 U. S. 201 (Oct. Term 1925, No. 169).

[3] The fact that pleas of not guilty were already on the record when the special plea was filed has no special significance, since under the liberal rules of modern practice, double pleading is permissible even in criminal cases. *Thompson* v. *United States*, 155 U. S. 271, 274, citing Bishop, Crim. Proc. (2nd ed.) Vol. 1, Sec. 750–753.

to begin until some weeks after this plea was interposed. Such testimony as had been taken before the Special Examiner was taken—

> in anticipation of trial and in preparation therefor * * *, at which trial either the defendants or the Government should be privileged to introduce additional testimony and to rely for prosecution or defense upon such portions of the testimony theretofore taken, transcribed, and lodged with said judge as might be desired * * *. (R. 63.)

Such a trial has never yet taken place. There having been no trial and neither side having designated or even indicated the testimony to be relied on, the court can not be regarded as having considered, under the general issue, that the evidence proved the truth of the allegations contained in the "motion to dismiss" or special plea in bar.

We submit, therefore, that the Trial Judge was right when he described this "motion" in the alternative as a special plea in bar (R. 54), and that accordingly the decision upon the plea is reviewable under the Criminal Appeals Act.

(*d*) THE DEFENDANTS IN ERROR HAVE NOT BEEN IN JEOPARDY WITHIN THE MEANING OF THE CRIMINAL APPEALS ACT

Normally, jeopardy is reached only after the full jury is impanelled and sworn and added to the other branch of the court and the preliminaries to the trial of the issues of fact have been disposed of. *Taylor* v. *United States*, 207 U. S. 120. This result

seems to have been reached upon the theory that there has been no jeopardy until the defendant has been put on trial on an issue of fact. "But, protection being against a second trial for the same offense, it is obvious that where one *has been tried* before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit." (Italics ours). *Kepner* v. *United States*, 195 U. S. 100, at page 128. Jeopardy in such a case would seem to attach when the court sits for the trial of the case, but only *after* the preliminaries to the trial of the issues of fact have been disposed of.

The case at bar is a criminal contempt. It was to have been tried before the court without a jury. The court appointed a special examiner to hold hearings and to take testimony in various States. The special examiner, however, had no power to rule on the admission or exclusion of evidence. She was obliged to receive everything, relevant or irrelevant, which might be offered by either side and to take it down in shorthand and transcribe afterwards in typewritten form. A hearing before such an examiner constitutes no part of the trial. *United States* v. *United Shoe Machinery Co.*, 198 Fed. 870. Testimony was taken before the special examiner but this testimony was taken as the trial judge declared—

> in anticipation of trial and in preparation therefor * * *, at which trial either the defend-

> ants or the Government should be privileged to introduce additional testimony and to rely for prosecution or defense upon such portions of the testimony theretofore taken, transcribed, and lodged with said judge as might be desired * * *. (R. 63.)

The "motion to dismiss" and the Government's demurrer thereto were filed and argued long prior to the date set for the trial of the cause in open court. (R. 63.)

The defendants, therefore, have never been in jeopardy; for they have never been tried by a judicial tribunal having jurisdiction. While the transcript of the testimony taken before the Special Examiner was lodged with the judge of the court in his official capacity, it was never submitted to a judicial tribunal sitting as a trier of the facts. Neither party had designated or concluded the evidence to be relied on at the trial. Neither party had had the opportunity to present or to argue its objections to the reception and consideration of irrelevant or prejudicial material taken before the Examiner. Where the tribunal has never been in a position to receive or consider evidence, there has been no jeopardy.

II

UPON THE MERITS THE DISTRICT COURT ERRED IN HOLDING THAT THE PERIOD OF LIMITATION APPLICABLE TO THIS CASE WAS ONE YEAR, AND NOT THREE

1. Section 25 of the Clayton Act, imposing a one-year period of limitation in certain classes of contempts, has no application to criminal contempts prosecuted by the United States

By the decision in *Gompers* v. *United States*, 233 U. S. 604, it was settled that criminal contempts are governed by the general three-year period of limitation applicable to non-capital crimes under R. S. 1044. (U. S. C. Title 18, Sec. 582.) The question here to be considered is whether that decision has been overturned by the passage of the Clayton Act.

Section 25 of the Clayton Act (Act of Oct. 15, 1914, c. 323, 38 Stat. 730, 740; U. S. C. Title 28, Sec. 390) at first sight appears to support the position of the defendants, for it provides—

> That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

The Government submits, however, that this section has no application whatever to the case at bar,

for the immediately preceding section (Sec. 24 of the Act) expressly provides—

> *That nothing herein contained shall be construed to relate* to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, *nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States,* but the same, *and all other cases of contempt not specifically embraced within section twenty-one of this Act,* may be punished in conformity to the usages at law and in equity now prevailing. (Italics ours.)

In other words, Section 24 of the Clayton Act provides that "*nothing herein contained*" (i. e. the one-year period of limitations) shall apply *either*—

(i) to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, *or*

(ii) to contempts committed in disobedience of a decree entered in a suit brought by the United States, *or*

(iii) to *any* type of contempt "not specifically embraced" within Section 21.

Section 21 describes a single class of contempt. This class includes *only* wilful disobedience of any order or decree of the court by the doing of any act forbidden by the decree (as opposed to the leaving *undone* of some act specifically required to be done) and only if the act constitutes also a criminal offence

under the laws of the United States or of the State where the act is done.

The narrow scope of these sections of the Act was clearly recognized in *Michaelson* v. *United States*, 266 U. S. 42, 66:

> It (the Clayton Act) is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, *and is in express terms carefully limited to the cases of contempt specifically defined.* Neither do we think it purports to reach cases of failure or refusal to comply affirmatively with a decree—that is to do something which a decree commands—which may be enforced by coercive means or remedied by purely compensatory relief. (Italics ours.)

In other words, the scope of the contempt provisions of the Clayton Act is limited to the single narrow class of contempts set forth in Section 21, as qualified by Section 24. To fall within this class, a case must possess four distinct characteristics.

> (I) The contemptuous act must consist in doing something which a decree says must not be done, as opposed to leaving *undone* something which a decree says must be done;
>
> (II) The doing of the act must constitute a criminal offense under State or Federal law;

(III) The contempt must NOT have been committed in the presence of the court, or so near thereto as to obstruct the administration of justice;

(IV) The original decree, which the defendant is accused of violating, must NOT have been entered in a suit brought by the United States.

If any one of these four conditions is not fulfilled, the contempt provisions of the Clayton Act (including the one-year period of limitation) do not apply, and the case is governed by the general law applicable to all other types of contempt.

The case at bar, it is clear, does not fulfill the fourth of these conditions; for the defendants are specifically charged with disobeying various provisions of a decree entered in 1916 *at the suit of the United States.* This fact brings the case squarely within the language of Section 24, which says that "nothing herein contained" shall be construed to apply to such a case.

The problem is therefore to determine the meaning of the phrase "nothing herein contained." Unless it can be shown that the application of this phrase does *not* extend to Section 25, the Government's contention must prevail.

The word "herein" in a statute may refer to any one of three things; (a) it may refer to the section in which it occurs, or (b) it may refer to the title, chapter, or other subdivision of the Act in which it occurs, or (c) it may refer to the whole Act.

In the present case, alternative (a), at least, is out of the question; for if we should construe "nothing herein contained" to mean, "nothing contained in this Section," we should have an enactment to the effect that "nothing contained in Section 24 shall apply to Section 24," which is nonsense.

Alternative (b) is, *prima facie*, out of the question also; for the Clayton Act is not divided into either chapters or titles. The District Court, however, declared in its opinion (R. ——), that the Clayton Act is a congeries of enactments dealing with a number of different subjects—monopolies, interstate commerce, labor injunctions, and lastly, contempts. From this undoubted fact the court proceeded to deduce the erroneous inference that Sections 21–24 constituted a separate title (though not labeled as such) which dealt with the procedure in contempt cases, and that the word "herein" contained in Section 24 must be restricted in its application to the three preceding sections contained in that "Title," to the exclusion of Section 25. In making this decision the District Court, we submit, ignored several very important facts. In the first place, it ignored the fact that Sections *21 to 25* (not *21 to 24*) of the Clayton Act formed a single unit throughout their entire legislative history, from the time when they were first introduced in the Sixty-second Congress under the name of the Clayton Contempt Bill (H. R. 22591, 62nd Cong., 2nd Sess.). In the second place, it ignored the fact that under the new United States Code, Congress has expressly grouped

Sections 21 to *25* (not 21 to *24*) together as a unit, apart from the remainder of the Clayton Act. Those two points are considered in more detail hereafter (pp. 33 and 39).

This holding, moreover, ignores the plain meaning of words. It proceeds upon the theory that the phrase "nothing *herein* contained" is to be interpreted as if it read "nothing *hereinbefore* contained." Such an argument, we submit, can not be sustained. "Herein" and "hereinbefore" are two very different words with very different meanings. No ground exists for supposing that Congress deliberately mistook the meaning of the words it employed, or for twisting the language of the statute to obtain a construction which is at variance with the literal and simple meaning.

There have been many cases construing the word "herein," as used both in statutes and in private documents. In no case, so far as counsel for the Government have been able to discover, has it ever been held that "herein" is synonymous with "hereinbefore," or that the application of "herein" is to be limited to what has gone before it. Several cases, in fact, hold precisely the contrary. *Iasigi* v. *Iasigi*, 161 Mass. 75, 79; *State ex rel Smiley* v. *Glenn*, 54 Tenn. 472. *Cf. Arthur's Executors* v. *Butterfield*, 125 U. S. 70, 76; *Arthur's Executors* v. *Vietor*, 127 U. S. 572, 576; *Smythe* v. *Fiske*, 23 Wall. 374, 381; *In re Berkowitz* (D. C. E. D. Pa.), 143 Fed. 598; *In re Pearsons*, 98 Cal. 603, 608; *May* v. *Simmons* (C. C. D.

Mass.), 4 Fed. 499; *McKibben* v. *Lester*, 9 Ohio St. 627.

2. The legislative history of the Clayton Act supports the Government's contention

It has been argued above that the one-year period of limitation set up by Section 25 of the Clayton Act has no application to criminal contempts prosecuted by the United States, by reason of the exceptions contained in Section 24. This contention is amply supported by a study of the legislative history of the Act, from which two facts appear: first, that Sections 21 to 25 (not 21 to 24) of the Act at all times formed a single unit of legislation, and second, that the expressed intention of the framers of the Act was to extend the application of Section 24 to include Section 25.

When the Clayton Act was reported by the House Committee on the Judiciary, the present Section 25 was Section 23; and the present Section 24 was Section 22. In the original form of the bill, these were the last two sections. Their language, and the order in which they were placed, remained the same throughout the progress of the bill. The only substantial alteration made to this part of the Act consisted in the addition by the Conference Committee of the present Section 26, which deals with the severability of the different sections in case any one of them should be held unconstitutional. (Conference Report, 63rd Cong., 2nd Sess., House Report No. 1168.)

The House Committee Report accompanying the bill (63rd Cong., 2nd Sess., House Report No. 627) sheds no direct light on the questions now at issue. It does point out, however (p. 21), that the contempt sections of the Clayton Act (namely, Sections 21 to 25) are merely a repetition of the bill introduced by Mr. Clayton in the preceding Congress, to which reference is made below.

In the debates in the House on the Clayton Act, Mr. Webb (a member of the Judiciary Committee in charge of the bill) declared:

> Section 22 (the present Section 24) provides that nothing contained *in this bill* shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States.
>
> Cong. Rec., Vol. 51, Part 9, p. 9075. (Italics and Parenthesis ours.)

The phrase "nothing contained *in this bill*," we submit, of necessity extends to the limitation provisions then contained in Section 23 (the present Section 25).

In the preceding Congress (the Sixty-second) Mr. Clayton had sponsored two bills, one dealing with the practice in injunction cases, and one dealing with the practice in contempt cases. These were familiarly known as the Clayton Injunction Bill and the

Clayton Contempt Bill. Their provisions were subsequently embodied in Sections 17–25 of the Clayton Act.

The Clayton Contempt Bill was H. R. 22591, 62nd Congress, 2nd Session. It passed the House and was referred to the Senate Judiciary Committee; but the Sixty-second Congress came to an end without the Senate Judiciary Committee reporting the bill. The bill took the form of an addition to the Judicial Code, to provide five new sections, 268a, 268b, 268c, 268d, and 268e. These five sections were the same as the present Sections 21 to 25 of the Clayton Act. Section 268d was identical with Section 24 of the Clayton Act; and Section 268e was identical with Section 25. In the House Committee Report accompanying this bill occurs the following statement (House Report No. 613, p. 2, 62nd Cong., 2nd Sess.):

> Section 268d (the present Section 24) excepts from the operation *of the act* contempts in the presence of the court, or so near thereto as to obstruct the administration of justice, and contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States, and provides that in the excepted cases as well as in all other cases not specifically embraced within section 268a, the punishment shall be in conformity to the usages at law and in equity now prevailing.
>
> Section 268e bars proceedings for contempt unless begun within one year from the date of

> the act complained of, and preserves the right of criminal prosecution, notwithstanding any proceeding and punishment for the contempts covered by the bill. It also excepts from the provisions of the bill any proceedings for contempt pending at the time of its passage.

Finally, Mr. Clayton himself, in the debate on the Clayton Contempt Bill in the Sixty-second Congress, not only indicated the same intention, but gave his reasons and his explanations when he said in debate:

> The next objection that was made to it was that it would probably detract from the power of the courts to enforce their decrees of dissolution of combinations denounced by the antitrust law. I violate no confidence when I say that that was the criticism of the chief legal officer of the present administration, Attorney General Wickersham. *We have met that objection by providing in this bill that it shall not apply in any case where the United States is the party complainant.* Every man in this House knows that in all proceedings under the Sherman antitrust law the United States is necessarily, by the terms of the statute, the complainant. So we answered that criticism in this bill. (Italics ours.) (Cong. Rec., Vol. 48, Part 9, page 8778.)

It is apparent, therefore, in the first place that Sections 21 to 25 of the Act (and not merely Sections 21 to 24), have always constituted a single related unit of legislation, from the time when they were first introduced as the Clayton Contempt Bill. If the Clayton Act is to be divided into "titles" at all, we

submit that the proper division includes Sections 21 to 25 as a group, and can not stop short with Section 24. If this be so, then the application of Section 24 will extend at least to the whole portion or "title" of the Act, which deals with contempts—namely to Sections 21 to 25. There is no reason, in fact, why it should not extend to the whole statute.

In the second place, it is apparent that the whole purpose of the framers of the Act was to set up a double standard with respect to contempt cases. The Clayton Contempt Bill (Sections 21–25 of the present Clayton Act) was to apply only in certain types of cases arising out of litigation.[4] These types are narrowly enumerated in the Act. The old standard of existing law was to continue to apply in all other cases, including all those in which the United States was a party to the original proceeding.

In all such other cases, no right to trial by jury exists under Section 22. That much is clear from the express language of Section 24. But that is not all. No warrant exists for supposing that Congress intended to make a distinction between the two classes of contempts upon the sole ground that trial by jury should apply to the one class and not to the other. On the contrary, we submit, the history of the Act shows that Congress intended to legislate fully as to all aspects of the single class of contempts

[4] This Court has already given effect to this intent of the framers of the Act by its interpretation of another section (Sec. 20) of the Act. *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443, at p. 471–2.

set out in the Act—to legislate with respect not merely to the method of trial, but also to the whole procedure of trial, the punishment, *and the statute of limitation*. The Clayton Act, in other words, sets up a single and complete Code of Procedure with respect to a single class of contempts. It does not attempt to legislate with respect to anything else. The right to trial by jury is not the only distinguishing mark of the contempts enumerated in Section 21. By Section 22 the punishment for such contempts is limited to a fine of $1,000 and imprisonment for six months. No such limitation applies to other types of contempt. By Section 23 the accused in such cases is given an absolute right to bail after conviction—a right which does not exist in other cases. Similarly, we submit, by Section 25 the accused is given the benefit of a special period of limitation, shorter than that prescribed by general law, and applicable only to the specific class of contempts with which Congress was then attempting to deal. The present case is not one of this class.

It may be argued that it is unreasonable to apply one statute of limitations to certain types of cases arising between private litigants, and a different one to other cases, including all cases where the United States is a party, and that for this reason the statute should be construed as fixing a one year period of limitations in all cases.

Such an argument, of course, can not be sustained in the face of a clear statutory provision to the contrary. If Congress sees fit to establish, with respect

to limitation, a distinction between different classes of contempt cases, its word is final. In this connection, it must be remembered that no statutes of limitation bind the Government unless the intention to do so is clearly and unequivocally expressed *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456; *United States* v. *Whited & Wheless, Ltd.*, 246 U. S. 552, 561; *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120, 125.

In enacting Section 25 of the Clayton Act, Congress might possibly have been content with silent reliance upon the principle that no statute of limitations binds the sovereign unless the intention to bind it is clearly expressed. But out of abundant caution, Congress went further. It has, in the language of Mr. Clayton, affirmatively expressed its intention that the Act "*shall not apply in any case where the United States* is the party complainant." That intention has been clearly embodied in Section 24.

3. The contention of the Government is supported by the language of the United States Code

Additional light is thrown upon the point at issue by an examination of the provisions of the new United States Code (44 Stat. Part I).

In the rearrangement of the permanent statutes of the United States embodied in the Code, Sections 21 to 25 of the Clayton Act, still constituting a single unit of legislation, have been placed together and are now found as Sections 386–390 of Title 28 on the

Judiciary. Section 389 of Title 28, replacing Section 24, significantly provides;

> *Nothing contained in sections 386 to 388 and 390* of this title shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. (Italics ours.)

Section 390, it will be noted, is the section imposing the one-year period of limitation, and is reenacted *verbatim* from Section 25 of the Clayton Act. Section 389, therefore, expressly provides that the one-year period of limitation embodied in Section 390 shall *not* be applicable to contempts arising out of cases where the United States was the original complainant, i. e., to cases such as the case at bar.

The enacting clause of the Code (Act of June 30, 1926, c. 712, 44 Stat. 1) states that the Code is designed to establish *prima facie* the law; but if there is an inconsistency between the language of the Code and the language of the old law, the latter is to prevail.

In the case at bar, no inconsistency exists between Section 24 of the Clayton Act and Section 389 of

Title 28 of the Code. On the contrary, we submit that the language of the Code, strengthening, as it does, the arguments of the Government, must be construed as a persuasive declaration of the existing law.

A general revision or codification of statute law is not lightly to be read as making a change in the law. *United States* v. *Sischo*, 262 U. S. 165, 168; *United States* v. *Ryder*, 110 U. S. 729, 740; *In re Derinza*, 229 Mass. 435, 442.

In the case of the United States Code, it is clear that neither the revisors nor the Congress intended to alter the existing law in any respect, however slight. The Committee Reports accompanying the Code are specific on this point. (House Report No. 900 and Senate Report 832, 69th Cong., 1st Sess.)

It is submitted, therefore, that the language of Section 389 of the Code should not be construed as making any change whatever in existing law. On the contrary, it should be construed as an interpretation placed by Congress itself upon its own prior enactments. As was said in *United States* v. *Freeman*, 3 How. 556, 564:

> If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; Lord Raym., 1028; and if it can be gathered from a subsequent statute in *pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its

meaning, and will govern the construction of the first statute.

Even if the language of the Code be regarded, not as a legislative interpretation of existing statutes, but merely as the deliberate opinion of the revisors upon the meaning of existing law, that opinion may nevertheless be properly considered. *Continental Insurance Co.* v. *Simpson* (C. C. A. 4th), 8 F. (2d) 439, 443. When the revisors and Congress altered the language of the statute from "*nothing herein contained*" to "nothing contained in sections 386 to 388 and 390," they were neither adding new law nor changing the old. They were merely restating, in a form altogether free from ambiguity, the law as it already was.

CONCLUSION

It is, therefore, respectfully submitted that the period of limitation to be applied to all charges in the present case is three years and not one, and that the judgment of the District Court be reversed.

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MARCH, 1928.

O

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No. 723

In the Supreme Court of the United States

October Term, 1927

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

JACOB A. GOLDMAN, et al.

BRIEF FOR THE DEFENDANTS IN ERROR

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No. 723

In the Supreme Court of the United States

October Term, 1927

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

JACOB A. GOLDMAN, et al.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE DEFENDANTS IN ERROR

STATEMENT

We can, in general, accept the Government's statement. We wish, however, to supplement it with the following:

The Government has printed only Sections 21 through 25 of the Clayton Act. It is our contention

that Section 25 means what it says in providing that no proceeding for contempt may be instituted unless begun within one year. It is the Government's position that this section is limited by Sections 21 through 24. Whether Section 25 is to be tied in with these sections or whether, in view of the whole Act, Section 25 is otherwise to be construed, is one of the important questions to be presented. It is, therefore, necessary that the entire Act be before the Court, and we have accordingly printed it as appendix A to this brief.

To give a clear picture of the situation existing at the time that the decision appealed from was made, the following additional facts should be noted: The Special Examiner appointed by the Court to take the testimony had taken 3050 pages of testimony over a period of approximately a year, and for this purpose had sat in over twenty States, from Massachusetts to California, and from Wisconsin to Texas (R. 41, 42 and 63). Following the filing of this testimony with the Court, a stipulation was filed under date of September 28, 1927 dismissing all but thirty-two charges out of a total of over one hundred and fifty charges, and providing that no further testimony should be taken before the Special Examiner (R. 43, 44). This left twenty-two defendants in the case, out of over ninety who were originally cited. On November 4, 1927, nineteen of these remaining defendants moved to dismiss twenty-six of the remaining charges (one of the defendants subsequently withdrawing his motion with respect to one charge), (R. 45, 55). The Government raised no objection to the hearing and determination of the motion, but opposed it merely upon the merits.

The Government states that the District Court designated the motion as a special plea in bar. In point of fact, the District Court in its opinion did not undertake to decide the nature of the defendants' pleading. The Court headed its opinion: "Upon motion to dismiss and demurrer to motion." The Opinion starts: "By motion to dismiss certain charges contained in the information in contempt and demurrer to this motion, treating the same as a special plea in bar," (R. 46). In its Judgment, the District Court found "that said motion is well-taken and should be sustained," and again, "that the motion filed by certain defendants * * * be and the same hereby is sustained" (R. 54, 55).

SUMMARY OF ARGUMENT

The defendants' brief will, in general, follow the order of the Government's brief, taking up the issues raised by the Government in the same order. The defendants contend:

(1) This Court has not jurisdiction of this case, because (a) a proceeding in contempt is not a criminal case within the meaning of the Criminal Appeals Act; (b) the defendants' motion to dismiss was not a special plea in bar within the third subdivision of the Act; and (c) the defendants were in jeopardy.

(2) Section 25 of the Clayton Act means what it says in providing that no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; and the District Court was correct in holding that the provisions of Section 25 were not limited by the provisions of Section 24.

ARGUMENT

I.

THIS COURT IS WITHOUT JURISDICTION IN THIS CASE

Admittedly, this Court's jurisdiction can be sustained only under the Criminal Appeals Act of March 2, 1907, which is set forth at length in the Government's brief (pp. 2, 3).

Decisions appealable thereunder are grouped into three subdivisions. A brief examination of the provisions of these three subdivisions is necessary.

The first permits an appeal from a decision quashing, setting aside or sustaining a *demurrer* to any indictment, where the decision is based upon the *invalidity, or construction of the statute upon which the indictment is founded.*

The second subdivision permits an appeal from a decision arresting a judgment of conviction for *insufficiency of the indictment,* again where the decision is based upon the *invalidity or construction of the statute upon which the indictment is founded.*

The third subdivision allows an appeal from a decision "sustaining *a special plea in bar,* when the defendant has not been put in jeopardy."

At the outset, it will be noted that the first subdivision deals with the insufficiency of the indictment, raised by demurrer, and the second with the insufficiency of the indictment, raised on motion in arrest of judgment, and both are limited to certain questions based upon the statute on which the indictment is founded. On the other hand, the third subdivision deals with the defendants' plea, viz., a special plea in bar. The limitation on the other subdivisions is no

longer appropriate, and has been dropped, and in place thereof is the limitation that the defendant must not have been put in jeopardy.

Admittedly, the jurisdiction of this Court cannot be sustained under the first or second subdivisions, because the decision was not based upon the validity or construction of the statute upon which the indictment was founded. The Government must bring itself within the third subdivision, or the jurisdiction of this Court fails. Three conditions must coexist to sustain the jurisdiction of this Court: (1) this proceeding must be a criminal case, to come within the statute; (2) the decision below must have sustained a special plea in bar, to come within subdivision 3; and (3) there must have been no jeopardy, so as to avoid the limitation of subdivision 3. If any one of these conditions does not exist, then there is no jurisdiction. We urge that none of the conditions exists.

The Government first argues that its Attorneys-General had pressed on Congress the view that the Government should always have the right of appeal from all unfavorable decisions on points of law where the defendant has not been in jeopardy; and that such a result is so desirable that this Act should be construed to produce that result. Obviously, if Congress had meant to grant the request of the Department of Justice in this regard, it could have done so in a short, simple statute with comprehensive language, instead of the statute that was actually passed. The very fact that the Attorneys-General had pressed on Congress the alleged defects in the law (e. g., with respect to informations against pasturing sheep on the reserves), defeats instead of aids the Government's argument; for, clearly, Congress then had those proceedings in

mind and failed to use language in the Act broad enough to cover them. If these matters had not been brought to Congress' attention, there might have been some argument that Congress accidentally overlooked them; but the Government points out that the Attorneys-General had for years been urging Congress for a comprehensive Criminal Appeals Act, and the fact that Congress passed no broader statute is most significant as to Congress' intent.

Moreover, we challenge the Government's assertions as to the intent of Congress, and annex to our brief (Appendix B) excerpts from the Congressional proceedings which make it apparent that Congress had no thought of contempt proceedings when it enacted this statute.

Furthermore, this Court has never so construed the Criminal Appeals Act. At common law, the Government would unquestionably have had no right of appeal. Secondly, this Court is a court of limited jurisdiction, and this statute grants it jurisdiction in a narrowly limited class of cases. Thirdly, the right of appeal therein given is unique, in that it provides for an absolute right of appeal from the District Court to this Court. Thus, the statute is in derogation of the common law in broadening the power of the Government against the right of the citizen; and it is a very limited statute giving an extraordinary right of appeal in very special and carefully-defined circumstances. The statute must, therefore, be strictly construed, and this Court has consistently so held. (*United States* v. *Weissman,* 266 U. S. 377; *United States* v. *Keitel,* 211 U. S. 371, 399).

(a) THIS PROCEEDING IS NOT A CRIMINAL CASE, WITHIN THE MEANING OF THE CRIMINAL APPEALS ACT

We deal here with the points covered under both Sections (Ia) and (Ib) of the Government's brief, as they are both different aspects of the same point.

This Court has consistently held that a proceeding in contempt is *sui generis*. Of course, at common law this writ of error could not have been brought. (*Ex parte Fisk*, 113 U. S. 713, 718). The question here presented is not the general nature of a proceeding in contempt, but merely whether it is a criminal case within the meaning and intent of this particular statute, giving this exceptional right to appeal.

The question has never been expressly decided by this Court. As we shall presently point out, the three cases relied upon by the Government are not in point. We urge, however, that this Court has, in fact, decided this question by its recent decision in *Myers* v. *United States*, 264 U. S. 95. In that proceeding for criminal contempt, the defendant challenged the jurisdiction of the District Court, on the ground that the acts occurred in another division of the District, and that, therefore, under the provisions of the Sixth Amendment to the Constitution and of the Judicial Code, the Court that tried him was without jurisdiction. That Amendment contains the language "criminal prosecution"; and Section 53 of the Code refers to "all prosecutions for crimes or offenses." This Court, in denying the claim of the defendant, held:

> "None of the cited Code sections makes specific reference to contempt proceedings." (p. 103.)

(Neither does the Criminal Appeals Act make reference, specific or otherwise, to contempt proceedings).

This Court concluded its opinion as follows:

> "While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our Government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions, within the Sixth Amendment or common understanding."

In short, this Court held that for the purpose of determining the jurisdiction of the District Court to try the case, a proceeding in criminal contempt was not a criminal prosecution within the meaning of the Sixth Amendment or the Judicial Code. We urge that it inevitably follows that a proceeding in criminal contempt is not a criminal case within the meaning of the Criminal Appeals Act granting exceptional jurisdiction to this Court to hear a limited class of appeals.

The phrase "criminal case" is no broader than "criminal prosecution." A "prosecution" is "the act of conducting any judicial proceeding" or "such proceeding itself" (Anderson's Law Dictionary). The Criminal Appeals Act manifestly cannot apply except that there first be a "criminal prosecution."

Moreover, the decision in *Myers* v. *United States* is still further in point. This Court rested its decision in part upon the language of Section 25 of the Clayton Act—the section upon whose construction the decision below was based. That section reads:

> "That no *proceeding for contempt* shall be instituted against any person unless begun within

> one year from the date of the act complained of; nor shall any such *proceeding* be a bar to *any criminal prosecution* for the same act or acts * * *." (Italics ours.)

This Court specifically pointed out:

> "* * * It also clearly recognizes the distinction between 'proceeding for contempt' and 'criminal prosecution.' "

This is of particular importance because the Clayton Act was passed by Congress seven years after the Criminal Appeals Act; and this section shows the careful distinction made between a proceeding for contempt and a criminal prosecution.

Elsewhere in the Clayton Act we find the same distinction carefully observed. Thus, in the sections of that Act authorizing trial by jury in certain proceedings for criminal contempt, it is expressly provided:

> "That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases * * *." (Section 23.)

From this it is plain that Congress recognized the difference between proceedings in criminal contempt and criminal cases; and further, that Congress, although it provided in Section 23 of the Clayton Act that a review of the limited class of cases there dealt with might be had as in a criminal case, yet, when it came to Section 25, wherein criminal contempts are broadly dealt with, did not provide that other criminal contempts should be subject to review as criminal

cases. Congress had in mind criminal contempts generally, the difference between criminal contempts and criminal prosecutions, and the necessity of providing for review. Congress could readily have provided in Section 25 that all proceedings in criminal contempt should, for the purposes of review, be treated as criminal cases, if that is what Congress intended. The intent of Congress is well shown both by what it said and by what it failed to say.

Reverting again to *Myers* v. *United States* (supra), we find that this Court pointed out that contempt proceedings were not criminal prosecutions within "common understanding." Certainly, words in so special a statute as the Criminal Appeals Act are not to be given a construction that would extend their meaning beyond "common understanding."

In the *Myers* case, the Solicitor-General successfully argued before this Court as follows:

> "Contempt is analogous to crime.
>
> But it differs from crime in numerous and important particulars.
>
> Contempts are generally classified as civil and criminal. But even those which are clearly criminal in character, differ from ordinary crimes.
>
> 1. Criminal contempts are tried summarily.
>
> 2. There is no right of trial by jury, save as specifically provided by statute. Contempts are not 'crimes' within Art. 3, Sec. 2, cl. 3 of the Constitution, which provides that: 'The trial of all crimes, except in cases of impeachment, shall be by jury * * *.' Nor are they 'criminal prosecutions' within the meaning of the Sixth Amendment.
>
> 3. Courts having no criminal jurisdiction may nevertheless punish for criminal contempt.

4. The defendant may, without a waiver or consent, be sentenced in his absence.

5. An act which is a contempt of court and also a crime may be punished summarily and by indictment; and conviction or acquittal in one will not bar the other.

6. A defendant is not entitled to be confronted with the witnesses against him in open court.

7. It is doubtful whether immunity from self-incrimination afforded by the Fifth Amendment to defendants in 'any criminal case' will relieve a defendant in contempt from examination as a witness, so long as he is not required to incriminate himself in any matter other than the contempt inquired into.

8. Finally, what is of particular importance in the case at bar—the court against which a contempt is committed has exclusive jurisdiction to punish it, and no change of venue can be allowed.

Because of these points of difference this Court, while recognizing their criminal aspects, has held that contempt proceedings are neither civil nor criminal, but are *sui generis.*" (Citations omitted.)

The Solicitor-General successfully urged this Court "not to construe the statutes which fix the venue of criminal offenses so as to embrace contempts." There the Government was dealing with the Judicial Code —a broad, general statute; here we are dealing with a special and limited statute. Certainly if contempts are not to be treated as criminal cases for the determination of jurisdiction under the broad statute, they should not be so treated for the purposes of jurisdiction on appeal under the specifically limited statute.

The Government in its brief (under Point [Ib], page 17), refers to the fact that the third subdivision does not use the word "indictment," while the first

and second subdivisions do, and seeks to draw comfort therefrom by pointing out that this subdivision is not subject to the argument that may be raised against the other subdivisions on account of the use of that word.

The Government's argument is too superficial. The real question is, what is the meaning of the words "criminal cases" in the opening sentence of the statute, which sentence marks the boundaries of the subject-matter with which the whole statute deals. Unless the proceeding is a criminal case, it does not come within the statute; the succeeding subdivisions still further limit the right to appeal, after it has been determined that the proceeding is a criminal case. The Act again and again uses the words "indictment," "verdict," and similar language, which are clearly and peculiarly applicable to criminal cases in the ordinary acceptance of the words but which have no application whatsoever to proceedings in contempt. The third subdivision does not use the word "indictment" because the subdivision is dealing with the defendants' pleadings, and the word "indictment" would have no place therein. There is not a suggestion that the third subdivision was intended to apply to any proceeding of a nature to which the first or second subdivisions were not also applicable. In vain do we search the statute for any words that are appropriate to contempt proceedings. Furthermore, the notable limitations in the first and second subdivisions exclude the idea that contempts could have been within the intent of Congress. The language is: "* * * based upon the invalidity or construction of the statute upon which the indictment is founded." Not merely is there no indictment in contempt proceedings, but such proceedings at the time of the passage of the Act were not

founded upon statute but upon "power inherent in all courts to enforce obedience." (*Meyers* v. *United States,* at p. 103.)

It is evident that the statutes which this law refers to are those Federal Statutes which make some act a crime and an indictable offense. It is only when the statute upon which the indictment is founded, that is, the statute defining the criminal offense which the indictment charges has been committed, is brought into question, that the Government can prosecute error under the first two sections of the Act. The very terms of the first and second paragraphs of the Act show that Congress did not intend to include "criminal contempts" within the term "criminal cases." Informations in Contempt are founded on violations of decrees, judgments or orders of the court. It must follow, therefore, that had Congress intended to include "Criminal Contempt" proceedings in the classification of "criminal cases" it would have further provided in the Act for the writ of error from a decision or judgment based on the validity or construction of a decree, judgment or order. If a motion to quash or a demurrer had been filed on behalf of any defendant in any given case in the Information at bar, requiring a construction of the Decree upon which the charge in the said Information is based, and the lower court had, on construing its decree sustained said motion or demurrer, or had any defendant been convicted and thereafter had the lower court arrested the judgment, basing its decision on the construction of its original decree, in either event no writ of error would lie to this court. This court would be without jurisdiction to hear, and the Government without right to prosecute, such an error proceeding under the Criminal Appeals

Act. There is no essential reason why provision should be made for appeals on the part of the Government where statutes upon which indictments are founded are involved and not for decrees, judgments and orders upon which Informations in Contempt are founded, if Congress meant to include "Contempt Proceedings" within the Act.

We submit that the language of paragraph 3, would require considerable amplification on the part of Congress to include a class of cases (Criminal Contempts) which it had carefully excluded from paragraphs 1 and 2.

Few words need be said with respect to the three cases relied upon by the Government.

Gompers v. *United Sates,* 233 U. S. 604, is clearly not in point. There it was held that the defendant would be given the benefit of the same statute of limitations as was given in criminal cases, this Court arguing that inasmuch as it was against the genius of our laws to have no period of limitations, either the statute could be construed broadly enough to cover contempts or, by analogy, it would be applied to contempts. This Court said: "A rule should be laid down, if not by Congress by this court."

In *Ex parte Grossman,* 267 U. S. 87, this Court held that a proceeding in criminal contempt was "an offense against the United States" within the meaning of Art. II, Sec. 2, Cl. 1 of the Constitution, giving the President power to grant pardons; but this Court also cited with approval the language from *Myers* v. *United States* given above, and pointed out that the term "offenses" as used in that clause of the Constitution is more comprehensive than the words "crimes and criminal prosecutions."

Michaelson v. *United States,* 266 U. S. 42, does not aid the Government, but on the contrary, by implication, aids the defendants. This Court there held that a statute giving the right of jury trial in proceedings for criminal contempts where the act was also a crime, was not violative of the Constitution. From that the Government can draw no comfort. If this Court had meant to hold that a criminal contempt was a criminal case, there would have been no need for a careful opinion as to why the statute was not unconstitutional—the shoe would have been on the other foot, for the Constitutional principle is that in criminal cases there should be a jury trial.

(*b*) THERE HAS BEEN NO DECISION OR JUDGMENT SUSTAINING A SPECIAL PLEA IN BAR WITHIN THE MEANING OF THE CRIMINAL APPEALS ACT

We agree with the Government that it is immaterial what the defendants call their pleading, as the only material question is what the pleading actually is. (*United States* v. *Barber,* 219 U. S. 72; *United States* v. *Storrs,* 272 U. S. 652).

What the defendants did was to file, under the circumstances hereinbefore set forth, a paper which read as follows:

> "Now comes the following defendants and they and each of them respectively move to dismiss the charge or charges set opposite his name below on the ground that it appears on the face of the information that this proceeding for contempt was instituted more than one year after the date of the alleged act or acts complained of in said charges." (R. 45.)

The third subdivision of the Criminal Appeals Act reads: "from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

This Court has very recently held with reference to this statute:

> "The statute uses the technical words 'a special plea in bar' and we see no reason for not taking them in their technical sense." (*United States* v. *Storrs*, supra.)

The words "special plea in bar" have long since acquired a well-settled meaning in the law. Those pleas appeared first in the civil law and subsequently in the criminal law. The essential and fundamental characteristic of a special plea (whether it be in bar or in abatement) is that it denies the right of the Government to succeed by reason of facts extrinsic to the indictment. As long ago as 1824, Starkie in 1 Criminal Pleadings 349, said:

> "By the plea in bar, the defendant shows, by matter extrinsic to the record, that the indictment is not maintainable."

Bishop adopts this definition in the same language (2 Bishop's New Criminal Procedure, 2d Ed. 1913, p. 583).

Mr. Justice Gray said for this Court in *Farley* v. *Kittson*, 120 U. S. 303, at page 315:

> "The distinction between a demurrer and a plea dates as far back as the time of Lord Bacon, by the 58th of whose Ordinances for the Administration of Justice in Chancery, 'a demurrer is

> properly upon matter defective contained in the bill itself, and no foreign matter; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or there is another bill depending for the same cause, or the like.' Orders in Chancery (Beames's ed.) 26. Lord Redesdale, in his Treatise on Pleadings, says: 'A plea must aver facts to which the plaintiff may reply, and not, in the nature of a demurrer, rest on facts in the bill.' Mitford Pl. 297. And Mr. Jeremy, in a note to this passage, commenting on the ordinance of Lord Bacon, observes, 'The prominent distinction between a plea and a demurrer, here noticed, is strictly true, even of that description of plea which is termed negative, for it is the affirmative of the proposition which is stated in the bill'; in other words, a plea, which avers that a certain fact is not as the bill affirms it to be, sets up matter not contained in the bill."

The distinction between demurrers or motions to dismiss, on the one hand, and pleas, on the other, is clear. The former set forth nothing new, but merely raise the issue of law that if everything alleged in the indictment be taken to be true, the Government cannot succeed. The latter, in contrast thereto, set forth one or more extrinsic facts necessary to the defense that the defendant asserts.

The distinction has been clearly recognized by Congress in the Criminal Appeals Act. Subdivisions (1) and (2) deal with the insufficiency of the indictment. Congress has there granted this Court jurisdiction only if the question involved is the construction or constitutionality of the statute upon which the indictment is based. Subdivision (3), on the other hand, deals with

special pleas in bar and contains no such limitation. Congress used technical words, and had clearly in mind the difference between the pleading that raises only the sufficiency of the indictment and the pleading that draws in matters not contained in the indictment.

There can be no doubt as to the category in which the pleading of these defendants falls. It set forth no new fact. It merely moved to dismiss, on what "appears upon the face of the information." It is unquestionably not a special plea.

But, says the Government, the defense of the statute of limitations can only be raised by special plea or under the general issue, and cannot be raised by demurrer. For this it cites *United States* v. *Cook*, 17 Wall. 168. The Government is right in saying that the defense of the statute of limitations may be raised under the plea "not guilty" (*United States* v. *Kissel*, 218 U. S. 601), (R. 39). But the balance of the Government's contention is incorrect.

It is true that the defense of the statute of limitations has usually been raised in pleadings that are properly called "special pleas in bar," rather than by demurrers or by motions to dismiss. That, however, is merely due to an accident rather than to anything inherent in their nature. The statute of limitations customarily pleaded is found in R. S. 1044; and that is restricted by R. S. 1045 so as not to apply to any person fleeing from justice. (Before the Revised Statutes, these two sections constituted but one, viz., Section 32 of the Act of April 10, 1790.) Therefore, whenever a defendant has desired the benefit of that statute of limitations, his pleading, of necessity, had to be a special plea in bar setting up the additional fact not appearing in the

indictment, viz., that the defendant was not a fugitive from justice.

This was well illustrated in *United States* v. *Cook*, (supra) cited by the Government. This court there held that the Statute of Limitations could not there be raised by demurrer because of this very limitation, saying:

> "* * * as such proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception." (p. 179, 180.)

Thus, whenever R. S. 1044 is relied on, a special plea in bar is necessary. Accordingly, when we examine *United States* v. *Barber*, 219 U. S. 72, relied on by the Government as a case in which the statute of limitations was held to be a plea in bar, we find that the defense was under R. S. 1044, and the brief of the defendant in error specifically stated (at page 9):

> "In this case the allegation that the defendants were not fugitive from justice constitutes the new matter."

The Government admits that the language of the earlier cases is in accordance with the rule as we have stated it, that the function of a special plea in bar is to set up new matter. The Government intimates that the rule has perhaps been changed, and states (without the citation of authority) that a plea in bar does not have to set up new matter and that the failure to do so is not essential to its nature. Obviously, this cannot be so, for if it were true, the careful distinction

that Congress has drawn between the first and second subdivisions, on the one hand, and the third subdivision, on the other, would be meaningless. On authority, the statement is wholly without support. As we have pointed out, this Court has but recently held that the words "a special plea in bar" are used in their technical sense (*United States* v. *Storrs,* supra); and we challenge the Government to point to a single holding by this Court to support its contentions. An examination of the authorities shows that wherever the question has been raised in this Court, the distinction has been kept clear. The explanation above given with respect to R. S. 1044 will explain most of the cases to which the Government refers.

Special reference, however, must be made to the three cases referred to in the first foot-note on page 23 of the Government's brief, which is the only place in which the Government expressly attempts to cite authority for its position. *United States* v. *Gompers,* 233 U. S. 604, is clearly not in point, because that was an appeal by the defendant and not by the Government, so that the Criminal Appeals Act and its provisions were not applicable. *United States* v. *Novek,* 271 U. S. 201, is, likewise, not in point. It there appeared that the defendant raised the defense under R. S. 1044. It is true that he failed to allege affirmatively that he was not a fugitive from justice; it is also true that the Government omitted to raise his failure to allege that fact; and the jurisdiction of this Court was conceded by both sides. Only the interpretation of the statute was argued, and the jurisdictional question was not mentioned in the opinion. But if we look past the errors of both sides and seek the substance of the situation, we find that the defendant raised the de-

fense of R. S. 1044, which necessitated a special plea in bar, so that the sustaining thereof did give this Court jurisdiction. When we come to *United States* v. *Rabinowich,* 238 U. S. 78, we have a case (and the only case that diligence of counsel on either side has been able to discover) in which a decision sustaining the defense of the statute of limitations not setting up a new fact, was successfully appealed to this Court; but the fact is that the question of jurisdiction was not raised by the briefs of either party nor by this Court; the opinion of this Court did not refer to the matter, and it is only by a painstaking examination of the record that this hidden fact can be brought to light. But this single exception does not cause us to qualify our statement in any way that this Court has never intentionally held that a pleading could be a special plea in bar where it did not set up a new fact. This Court has never let down the bars, and we submit that, in view of its decisions and of the express language of the Criminal Appeals Act, it cannot do so.

In the case at bar, the statute of limitations relied on is Section 25 of the Clayton Act. It will be noted that this contains no such limitations as are found in R. S. 1044 and 1045; it calls for no such pleading. Accordingly, all the facts necessary for the defense appeared upon the face of the information, and the defendants, therefore, did not have to plead a special plea in bar setting up any additional fact. In reality, if they had attempted to plead a special plea in bar, their pleading would not have been such.

The Government also cited *United States* v. *Cook* (supra), as authority for the proposition that the statute of limitations could not be raised on demurrer.

This has been held in several cases for the reason given by the Court in that case, viz:

> "Also, for the reason that the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have the right to do, under the general issue, to show that the offense was committed within two years next before the indictment was found and filed." (p. 180.)

The theory thus advanced is that in the ordinary case the prosecutor is not bound by the date set forth in the indictment, so that the defendant should be left to raise the statute of limitations under the general issue which would give the prosecutor the opportunity of proving that the crime was committed within the period allowed by the statute. But, clearly, when the reason does not exist, the rule should not be applied. (See *United States* v. *Owen*, 32 Fed. 534.)

In our case, the reason for the rule did not apply, and the Government properly refrained from raising the point. Voluminous testimony had been taken before a Special Examiner, which testimony had been returned by the Examiner and was in the Court. Everyone connected with the case knew what the evidence would show as to the dates upon which the alleged acts had been committed. In handling a case of criminal contempt, the Court has considerable latitude:

> "The exact form of the procedure in the prosecution of such contempts is not important." (*Cooke* v. *United States*, 267 U. S. 517, 536.)

And

> "The manner in which the proceeding shall be conducted, so that it is without oppression or unfairness, is a matter of judicial regulation." (*Randall* v. *Brigham*, 7 Wall. 523, 540.)

The defendants had entered a plea of "not guilty"; the facts and dates had been pleaded with great exactitude in the information, and the testimony that had been taken had, as a practical matter, removed the question of variance. The Court very properly, in the exercise of its discretion, took up this issue, and the Government very properly raised no objection thereto. No right of either party was infringed thereby; neither side offered any objection thereto; and a decision was reached expeditiously and without further expense, on a question that finally disposed of substantially the entire litigation. If the prosecutor had raised the point that moved this Court to its decision in *United States* v. *Cook*, 17 Wall. 168, or if this had been a criminal case, subject to stricter rules of procedure than a proceeding in contempt, we might have been confronted with a different situation. But neither of those conditions existed.

Moreover, the correctness of the decision of the Court in considering and deciding the applicability of the statute of limitations in this form, is not before this Court for decision. Unless there has been a decision sustaining a special plea in bar, this Court is without jurisdiction; and if the defendant's pleading was a motion to dismiss or a demurrer, then, even if the Court below was in error in entertaining it and deciding it, we respectfully urge that it would be an error that this Court could not correct. From such an error,

the Government cannot take a writ under the Criminal Appeals Act.

There is left to us merely to take up what we understand is the substance of the Government's argument, namely, that if the instrument filed by the defendants is not a special plea in bar, what is it. That question is wholly beside the point. The only question before this Court is whether the defendants have interposed a special plea in bar. Clearly, they did not do so; and as they did not do so, no writ of error lay on the part of the Government to review the judgment, and this Court is without jurisdiction. Although we do not believe it is necessary for us to answer the Government's question, still, for our own part, we contend that the defendants' pleading was exactly what it purported to be, viz., a motion to dismiss the information, for a good and sufficient reason in law appearing upon the face thereof. We believe and contend that the motion was properly entertained and properly decided; but even if it were improperly entertained, the error is not one that the Government can review under the Criminal Appeals Act.

Finally, we must call attention to the paper that was filed by the Government. It was called "a demurrer to a special plea in bar," in an attempt to bring the case within the Criminal Appeals Act. Names are, of course, inconsequential. If the defendants' pleading were truly a special plea in bar, a demurrer to it could have been interposed. But the test of the defendants' pleading, in the light of the Government's demurrer, is perhaps the concluding argument that it was not a special plea. There was nothing that this demurrer could possibly cover. A demurrer admits the facts alleged in the pleading to which it is directed,

and denies their sufficiency in point of law. The Government could not claim that any new matter alleged by the defendants as a defense did not, in law, constitute a defense. There is not a fact alleged in the defendants' pleading. The impossibility of the Government demurring to the defendants' pleading is the final proof that it was not a special plea.

(*c*) THE DEFENDANTS HAVE BEEN PUT IN JEOPARDY

The Government might have taken the position that the defendant never is in jeopardy in a legal sense in a criminal contempt proceeding; and there is authority in the State Courts to that effect, based upon the proposition that proceedings in contempt are only quasi-criminal and that the Constitutional provisions respecting former jeopardy are not applicable. (See *Jones* v. *Mould*, 151 Iowa 599; *Brown* v. *Farley*, 38 N. J. Eq. 186.) Had the Government taken that position, it would have furnished an additional reason for our contention under Point A that this proceeding in criminal contempt was not a criminal case, within the Criminal Appeals Act, especially within the view of the language of the third subdivision.

The Government, however, in its brief has not taken that position, but apparently admits that jeopardy can arise in a proceeding for criminal contempt. The question then presented is whether in the instant case the defendants were put in jeopardy.

In determining just when a defendant has been "put in jeopardy" the decisions of the courts in ordinary criminal cases where a jury is required are of very little assistance except to establish the rule that a de-

fendant has been put in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him. Usually it has been held that this point is not reached until the jury is sworn. However, the protection against double jeopardy is applicable in tribunals organized without a jury. In the case of *Kepner* v. *United State,* 195 U. S. 100, this court says (p. 128):

> "It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so after acquittal. *Coleman* v. *Tennessee,* 97 U. S. 509. Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit. *People* v. *Miner,* 144 Illinois 308; *State* v. *Bowen,* 45 Minnesota 145; *State* v. *Layne,* 96 Tennessee 668."

In *Grafton* v. *United States,* 206 U. .S 333, the defendant had been tried before a general court-martial under the Articles of War and had been acquitted. He was afterwards prosecuted by the civil officers un-

der the Philippine Penal Code. We quote the following from page 352:

> "If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States. A different interpretation finds no sanction in the Articles of War; for the 102d Article of War (which is the same as Article 87, adopted in 1806, 3 Stat. 369) declares that 'no person'—referring, we take it, to persons in the Army—'shall be tried a second time for the same offense.' But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government. Congress has chosen, in its discretion, to confer upon general courts-martial authority to try an officer or soldier for any crime, not capital, committed by him in the territory in which he is serving. When that was done the judgment of such military court was placed upon the same level as the judgments of other tribunals when the inquiry arises whether an accused was, in virtue of that judgment, put in jeopardy of life or limb. Any possible conflict in these matters, between civil and military courts, can be obviated either by withholding from courts-martial all authority to try officers or soldiers from crimes prescribed by the civil power, leaving the civil tribunals to try such offenses, or by investing courts-martial with exclusive jurisdiction to try such officers and soldiers for all crimes, not capital."

And also the following from page 355:

> "But passing by all other questions discussed by counsel or which might arise on the record, and restricting our decision to the above question of double jeopardy, we adjudge that, consistently with the above act of 1902 and for the reasons stated, the plaintiff in error, a soldier in the Army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that Territory."

In our brief and in the Government's brief there appear references to the various proceedings had before the District Court up to the time of the entry of the judgment of dismissal. These, of course, are also disclosed in the record. The information was filed on November 2, 1925; defendants pleaded "not guilty" on February 15, 1926; on March 1, 1926 the Court appointed the Examiner to take testimony; during the next year over 3000 pages of testimony were taken, and in May 1927 the taking thereof before the Special Examiner was terminated. The case was then in the position that the Government could pass upon the merits of its case against the various defendants, and it dismissed about 80 percent. of the charges. With respect to the remainder, the Court was fully advised that one of the issues that was raised by the plea of "not guilty" and that the Court would have to try, was the issue of the statute of limitations. The Court, in the exercise of the full discretion granted to it, took up the trial of this issue prior to the trial of the remaining issues in the case. The issue so tried was a substantive issue that went to the merits; there was

every reason, from the standpoint of economy of time and money, why that issue should have been first tried; and it is noteworthy that neither side objected to the court so proceeding. The judgment of the Court was a decision in favor of the defendants on this substantive issue that went to the merits. In its decision on the motion, the District Court says (R. 54):

> "The demurrer being overruled and in our opinion the Special Plea in Bar stating a good defense of the running of the Statute of Limitations, it follows that the several charges which show upon their face that such statute has run, must be dismissed and an order may be drawn accordingly."

In *United States* v. *Oppenheimer, et al.*, 242 U. S. 85, the Court held that a plea of the statute of limitations is a plea to the merits and a judgment for defendant that the prosecution is barred by limitation of time goes to his liability in substantive law; and in whatever form the issue was raised, such a judgment may be interposed as a conclusive bar to another prosecution for the same offense.

In the instant cases the defendants were before the court on their plea of "not guilty" to an Information filed by the Government. They were (if these are criminal cases) "regularly charged with a crime" and at any event whether charged with "crime" or not, they were "before a tribunal properly organized and competent to try them" on November 4, 1927. There were no further steps to be taken to perfect the organization of the tribunal which was to hear and pass on the charges. The hearing was held before the *only* tribunal that could hear the charges against them.

Merchants, etc. Co. v. *Board of Trade*, 201 Fed. 20, 27.
Myers v. *United States*, 264 U. S. 95.

It was "a competent tribunal having jurisdiction" (*Kepner* v. *United States,* supra) and after hearing a substantive defense going to the merits of their cases, that tribunal dismissed them for the reason that applying the law to the admitted facts, defendants were entitled to an acquittal. The form in which this issue was raised is immaterial.

United States v. *Oppenheimer,* 242 U. S. 85, 88.

To summarize, we submit therefore:

That even if Contempt Proceedings are "Criminal Cases" within the meaning of the Criminal Appeals Act, and even if the motion to dismiss, filed in the instant cases should be held to be "A Special Plea in Bar" nevertheless the third subdivision of said act does not apply for the reason that these defendants-in-error were "put in jeopardy" and therefore this court is without jurisdiction to review the instant cases on error.

II

THESE PROCEEDINGS ARE BARRED BY LIMITATION OF TIME

Defendants claim, and the court below decided (opinion R. 46) that these proceedings are barred by virtue of Section 25 of the Clayton Act (38 Stat. 730) which we have printed as Appendix A to this brief.

1. Section 25 is clear and comprehensive, leaves no room for construction and does not require a resort to judicial interpretation

There is no ambiguity in the language used in this section on the subject of the limitation of time within which any proceeding for contempt may be instituted against any person. Congress could not have used any plainer or more comprehensive words to express its

intent. The language is "that no proceeding for contempt shall be instituted." There is nothing here calling for construction, for the words mean exactly what they say, and any argument or amplification is superfluous. Nothing is obscure and therefore there is no need of interpretation.

As this court said in *Michaelson* v. *U. S.*, 266 U. S. 42, on page 68, in connection with the language of another section of the Clayton Act, "the words of the act are plain and in terms inclusive of all classes of employment, and we find nothing in them which requires a resort to judicial construction." The same statement may be accurately made in connection with the language of Section 25 and the classes of contempt referred to, for the words are plain and inclusive of all classes of contempt. In *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, this court refused to place any limitation on the broad language calling for construction in that case (page 38).

In Section 24 the Act refers to certain classes of contempt, including all cases of contempt not embraced in Section 21. These classes cover practically all contempts, and the reason for mentioning them was to exempt them from the procedure and punishment provided in Sections 21 to 23, and to provide for their punishment in conformity to the usages at law and in equity then prevailing, meaning, without a trial by jury. With these classes in mind, Section 25, which follows Section 24, and introduces a new subject, uses the most comprehensive terms to include every contempt proceeding, embracing those just mentioned for special reasons in Section 24. The contrast is impressive and the intent clear. To endeavor to make this plainer would be like an effort to reason upon a sum in simple addition. *Slingluff* v. *Weaver*, 66 O. S. 621.

2. An analysis of the act supports defendants' contention

The ambiguity claimed by the Government results from the opening words of Section 24. That section provides "that nothing herein contained shall be construed" to relate to certain contempts thereafter referred to.

Both parties admit that these words are of limited scope. The difference between them is the extent of the limitation. The Government claims that the words are applicable to Sections 21 to 25, inclusive. The defendants claim that the words are applicable to Sections 21 to 23, inclusive. The difference between the parties is that the Government undertakes to include Section 25 within the meaning of the phrase "nothing herein contained," whereas the defendants exclude Section 25. Neither party applies these words to the entire Act or to Section 24 only.

The Clayton Act by its title and contents admittedly includes several purposes, and covers a number of subjects more or less unrelated. This point is nowhere better stated than in *Sandefur* v. *Canoe Creek Coal Company*, 293 Fed. 379, at page 380 as follows:

> "The Act, considered as a whole, covers several more or less distinct subjects. It is entitled 'An Act to Supplement Existing Laws against Unlawful Restraints and Monopolies, and for other Purposes.' The first eight sections pertain directly to the subject of Trusts and Monopolies (Compt. St., Secs. 8835-A—8835-H); Section 9 (Compt. St., Sec. 8602, concerns Interstate Commerce; Section 10 (Compt. St., Secs. 8835-1), Combinations among Common Carriers; Section 11 (Compt. St., Sec. 8835-J), Proceedings to Enforce Certain Provisions of the Act; Sections 12-16 (Compt. St., Secs. 8835-K—8835-O), Anti-trust Procedure and

Remedy; Sections 17-19 (Compt. St., Secs. 1243-A—1243-C), Regulations of Injunction and Restraining Orders in all Cases; Section 20 (Compt. St., Sec. 1243-D), Limits the Power of an Equity Court to issue any injunction in a certain class of cases, viz: between employer and employee; and Sections 21-24 (Compt. St., Secs. 1245-A—1245-D), pertain to procedure in any District Court punishing contemptuous disregard of any order of such Court, providing the act constituting the contempt is also a criminal offense."

At various places in the Act words are used that are designed to limit the text to the particular subject-matter then under consideration. For examples, see the language of the two provisos in Section 2, of paragraph 4 in Section 7, of Section 16, Section 22 and the last sentence of Section 25. This was necessary in an act containing so many distinct and separate subjects, even though related in some of their aspects.

It becomes important, therefore, to consider the subject-matter to which Section 24 was intended to apply. We contend that it is the matter of procedure and punishment of contempts covered by Sections 21 to 23, inclusive. Section 21 refers to a specific kind of contempt and provides for the procedure as thereafter stated. Section 22 sets forth with some particularity the procedure to be followed, and Section 23 provides the method of review and for admission to bail. The most significant feature of the procedure, and the one which commanded the attention of Congress particularly, was the provision for a jury trial. This was novel and questionable, and required caution in its enactment. A limited class of contempts was selected for the experiment. It is quite evident that the only purpose of Section 24 was to exempt the classes of contempt

therein stated (including all contempts not specifically embraced in Section 21) from the procedure and punishment of the contempts referred to in Sections 21 to 23, inclusive, particularly from trial by a jury.

The subject-matter of Sections 21 to 23 ended with Section 24, which is in the nature of a proviso and could have begun with the word "provided." That it does not is immaterial for such is its clear purpose and intent, and it is a well-settled principle that a proviso refers to matter preceding it and has no reference to that which follows.

Section 25 then takes up a new subject-matter entirely independent of what precedes it, although related in general aspects. Both subjects have to do with contempts it is true, but each is separate and distinct in purpose and content.

A somewhat analogous situation was considered by this court in *U. S.* v. *Fisher*, 2 Cranch 358. The court there called attention to the fact that certain sections of the Act were connected and plainly contained provisions on the same subject, whereas the next section was unconnected with those preceding it and was not limited by them. (See pages 389 and 390.) Such is the case here.

The position of Section 25 in the Act is significant and not without purpose. If Congress had intended that it should be limited by the provisions of Section 24, the two sections would have been reversed.

When all of these matters are considered, in connection with the clear and comprehensive character of the language used in Section 25, we submit that the court below was right and its opinion should be approved by this court.

3. The history and purposes of the Act support the construction of the defendants

Contrary to the claim of the Government, the history and purposes of the Act are more in harmony with the construction claimed by the defendants than the one asserted by the Government.

Mr. Clayton introduced two bills in the Sixty-second Congress, second session (1912), which were commonly known as "The Clayton Injunction Bill" and "The Clayton Contempt Bill." The latter was introduced on March 29, 1912 and became H. R. 22591. It provided for five additional sections to the Judicial Code to be known as 268-a to 268-e, inclusive. The Bill passed the House, but failed of passage in the Senate during the Sixty-second Congress. These sections, in substantially the same form, became Sections 21 to 25, inclusive, of the Clayton Act, as passed by the Sixty-third Congress in 1914.

The original contempt bill (H. R. 22591) was referred to the Committee on the Judiciary of the House. The Government cites (brief 35 and 36) two paragraphs of the committee report, but omitted a third paragraph. The full statement of the committee was as follows:

> "Section 268-D excepts from the operation of the Act contempts in the presence of the court, or so near thereto as to obstruct the administration of justice, and contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States, and provides that in the excepted cases as well as in all other cases not specifically embraced within section 268a, the punishment shall be in conformity to the usages at law and in equity now prevailing.

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Section 5, or 268-E, makes the Statute of Limitations in SUCH CASES, and in *ALL CONTEMPT CASES, ONE YEAR* from the act complained of, nor shall any such proceeding bar the criminal prosecution for the same act or acts. Nothing in this Act shall affect any proceedings for contempt pending at the time of the passage of this Act."

(Congressional Record, Volume 48, part 9, page 8803.)

(Emphasis our own.)

We submit that Mr. Webb was correct in this statement that the section referred to made the Statute of Limitations applicable in all contempt cases. There would seem to be no doubt, therefore, that when in the succeeding Congress Mr. Webb made the statement quoted in the Government's brief (page 34), he was referring, as did the committee in its report on the earlier Bill, solely to so much of the Bill as granted and applied to the right of trial by jury.

In Report No. 613, accompanying the 1912 Contempt Bill, the committee states that the feature of the Bill against which the most strenuous argument had been directed was the provision for trials by jury. The following statement in reference to the purposes of the Bill is made by the committee:

"The bill is an evolution from prolonged and varied discussion, by no means limited to a recent date or to the present Congress. Every feature and provision of it has been subjected to attack and defense, but the whole controversy appears to have at length converged upon the issue of whether or not the policy and practice of jury trial in con-

tempt cases shall be admitted in the Federal jurisprudence at all.

That complaints have been made and irritation has arisen out of the trial of persons charged with contempt in the Federal courts is a matter of general and common knowledge. The charge most commonly made is that the courts, under the equity power, have invaded the criminal domain, and under the guise of trials for contempt have really convicted persons of substantive crimes for which, if indicted, they would have had a constitutional right to be tried by jury. It has been the purpose of your committee in this Bill to meet this complaint, believing it to be a sound public policy so to adjust the processes of the courts as to disarm any legitimate criticism; and your committee confidently believes that, so far from weakening the power and effectiveness of Federal courts, this bill will remove a cause of just complaint and promote that popular affection and respect which is in the last resolve the true support of every form of governmental activity."

The history about the limitation provision is as follows:

Shortly prior to the time that Mr. Clayton introduced his Bill in the Sixty-second Congress, this court decided *Gompers* v. *Buck Stove & Range Co.,* 221 U. S. 418. At that time there was no Statute of Limitations in reference to contempt proceedings and Mr. Clayton in his Bill undertook to supply that deficiency.

Gompers v. *U. S.,* 233 U. S. 604, was decided by this court on May 11, 1914, and by analogy this court fixed the limitation for three years, calling attention to the fact that some time limit should be placed on contempt proceedings either by Congress or the court. At that time the Clayton Act was before Congress and was finally passed on October 15, 1914, with Section 25

clearly providing that no proceeding for contempt should be instituted against any person unless begun within one year from the date of the act complained of. It was undoubtedly the purpose of Congress to supply an omission referred to by this court and we submit that it was efficiently done by the enactment of Section 25.

4. The Government's contention is unreasonable and leads to results that could not have been intended by Congress

The contention of the Government is that by reason of the provisions of Section 24, Section 25 does not apply to

(a) Contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice.

(b) Contempts committed in disobedience of a decree in a suit brought by the United States.

(c) Any type of contempt not specifically embraced within Section 21.

It is claimed that the type embraced within Section 21 is of narrow scope and the contemptuous act must constitute a criminal offense under state or Federal law and must be something done as distinguished from an omission to act.

Under this construction Section 25 covers only contempt cases arising from the violation of an order entered in litigation between private parties when the act of contempt constitutes a crime. In all other cases, according to the Government's contention the limitation of time is three years. This includes not only contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice but every other kind of contempt.

In other words Sections 21 to 25 inclusive cover only a very small and limited class of contempts and the mass of contempts are exempted from all the provisions of the Act, including the time limit within which they may be instituted. This small but heinous class (because also criminal) is favored with a one-year statute of limitations, while all other classes of contempt may be prosecuted at any time within three years. This is certainly a most anomalous situation and excites suspicion as to whether it conforms to the intent of Congress.

It is to be observed that no sufficient reason appears for the one year limitation when the contemptuous act is a crime and a three year limitation when it is not a crime. Reason and common sense would suggest the opposite. If a contempt is committed in the presence of the court a one year limitation is much more reasonable than a three year limitation, yet under the Government's claim such a contempt could be prosecuted at any time within three years and so with all other contempts except those embraced within Section 21.

This contention presupposes that Congress proposed to establish a one-year limitation for the contempts covered by Section 21, unless the order disobeyed was entered in a suit brought by the United States. In all other cases the three-year limitation established by this court was to prevail. If this be correct, why didn't Congress say so? The object to be accomplished according to this theory was simple and plain. Why should Congress resort to circumlocution?

If Congress had intended this result in the passage of the Clayton Act it is very strange that it took such a peculiar way to accomplish that purpose. We maintain that if it had been so intended appropriate and

direct language would have been used. As it is, the language of Section 25 is broad and comprehensive and the result above stated is only reached by limiting that section in view of the language of Section 24. We maintain this is unreasonable, and directly contrary to Congressional intent.

Why should Congress legislate at all on the subject of the limitation of time after this court had adopted the three-year rule? Certainly for no other reason than to change that rule, or to confirm its universality. According to the Government, it did neither, but selected a small class of contempts, and without any reason, in fact unreasonably, established a one-year period for that class, leaving all others under the rule adopted by this court, and all this it did indirectly and circuitously. Such methods should not be imputed to Congress.

We submit such results are nothing short of absurd and should not be countenanced by this court.

5. *The new United States Code is neither authoritative nor helpful on the point involved*

The Code of Laws of the United States of America in force December 6, 1925, is found in 44 Statutes, part 1. The enacting clause is found on page 1. It provides that the matters set forth in the Code shall establish *prima facie* the laws of the United States in force December 7, 1925, but nothing in the Act shall be construed as repealing or amending any law or as enacting any new law. In case of any inconsistency arising through omission or otherwise between the provisions of any section of the Code and the corresponding portion of legislation, effect shall be given for all purposes whatsoever to such enactments.

We do not understand that the Government claims anything more than that the language of the Code states

the opinion of the revisors (not necessarily Congress) upon the meaning of existing law without adding any new law or changing the old. The Government inferentially admits that Congress is not entirely responsible for the arrangement of the Code. It may be that the Department of Justice itself contributed a share in the work. It would be a very unsafe rule for this court to establish that the opinion of the revisors, even though they be in the Department of Justice, is of any particular value to this court in the construction of an Act such as the Clayton Act. The opinion of the court below in this case, is much more valuable.

Congress evidently intended that the courts should go to the original Act and determine the intent of the legislators from the language used in such Act.

The committee on the revision of the laws recognized the possibility of error in the Code as presented. Scrutiny and criticism were invited by the committee. (See Preface to the Code.) They need it in this particular instance.

This court can not base its opinion upon such an uncertain authority as the unnamed revisors and codifiers whose services were availed of by Congress.

CONCLUSION

In view of all of the foregoing, it is therefore respectfully submitted:

(1) That for the reasons set forth herein, this court is without jurisdiction to review the instant cases on error.

(2) That the time limitation to be applied to all charges in the instant cases is one year, and not three years, as claimed by the Government.

(3) That the charges against the respective defendants herein fall within the category defined by this court in the Gompers case (233 U. S. 604, 610) to-wit: that each "is a charge of specific acts . . . and therefore each must be judged by itself" and consequently the District Court was right in dismissing the charges in each instance where the same was done, and its judgment, therefore, should be affirmed.

Respectfully submitted,

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